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ABSTRACT

The Americans with Disabilities Act (ADA) and Family and Medical Leave Act (FMLA) are two major pieces of social legislation that impact private and public employers, including school districts. Public school employers must have thorough awareness of the legal requirements of both laws and must analyze the ways in which those requirements interface with collective-bargaining obligations. This document describes legal requirements, negotiations, and policy considerations that are impacted by the two laws. The first section discusses how to successfully integrate the ADA with the legal duties associated with the collective-bargaining process. It examines the extent to which collective-bargaining-agreement requirements pose an undue hardship and describes how to avoid direct bargaining charges. A sample ADA provision is included. The second section presents information on the key aspects of the Family and Medical Leave Act and provides a framework for developing district proposals and/or policies. The major provisions of the FMLA are described. The third section discusses issues in negotiating family-care leave, which include coordinating FMLA leave with existing leave provisions in collective bargaining agreements, creating notice and certification requirements, and responding to requests to extend the benefits afforded under state or federal law. (LMI)

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THE AMERICANS WITH DISABILITIES ACT AND FAMILY AND MEDICAL LEAVE ACT: LEGAL REQUIREMENTS, NEGOTIATIONS AND POLICY CONSIDERATIONS

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THE AMERICANS WITH DISABILITIES ACT AND FAMILY AND MEDICAL LEAVE ACT: LEGAL REQUIREMENTS, NEGOTIATIONS AND POLICY CONSIDERATIONS

The Americans With Disabilities Act and Family and Medical Leave Act are two major pieces of social legislation impacting private and public employers, including school districts. Public school, employers must become thoroughly familiar with the legal requirements of both laws and must analyze the ways in which those requirements interface with collective bargaining obligations. These laws also raise issues related to liability and fiscal considerations. In addition, public school employers must consider community response since board policies and collective bargaining agreements are matters of public record and may be the subject of public discussions.

I. THE AMERICANS WITH DISABILITIES ACT

A. Introduction

The Americans With Disabilities Act ("ADA", 42 U.S.C., § 12111) presents new challenges to school employers. One challenge is how to balance the rights of disabled employees with the rights of nondisabled employees in the context of seniority rules, transfer, promotion and reemployment rights. In addition, the duty to engage in the interactive process of considering reasonable accommodation may be viewed by the union as direct bargaining or bypassing the exclusive representative.

B. Do Collective Bargaining Agreement Requirements Pose an Undue Hardship?

The ADA requires reasonable accommodation of qualified disabled employees unless the reasonable accommodation places an

undue hardship on the employer.[1/] The regulations implementing the ADA delineate the following undue hardship factors:

> The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;
>
> The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
>
> The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;
>
> The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and
>
> The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.[2/]

The ADA statute and regulations do not specifically mention collective bargaining agreements ("CBA") as a factor to be considered when an employer wants to demonstrate undue hardship. Since CBA's are not specifically referenced, it is necessary to look at other requirements of the ADA and the legislative history to determine Congress' intent in this area.

The ADA provides that discrimination includes,

> Participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered

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[1/]The interrelationship between seniority rules and the ADA is less clear than it was under Section 504 of the Rehabilitation Act of 1974. Courts found that seniority rules did take precedence over requests for reasonable accommodation under section 504; however, the success of this position is less likely under the ADA.

[2/]42 U.S.C. § 12111(10).

> entity's qualified applicant or employee with a disability to the discrimination prohibited [by the Act.][3/]

This includes a relationship with a labor union.[4/]

The congressional history of the ADA includes references to consideration of CBA's as a factor in an undue hardship analysis. For example, in the Report of the Senate Committee on Labor and Human Resources the following language appears:

> The collective bargaining agreement could be relevant, however, in determining whether a given accommodation is reasonable. For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to that job.[5/]

A House Committee on Education and Labor Report contains similar language; however, it states that a CBA "will not be determinative on the issue" of whether it is a reasonable accommodation to assign a disabled employee to a job requiring greater seniority than she possesses.[6/] The House Report also states:

> In other situations, the relevant question would be whether the collective bargaining agreement articulates legitimate business criteria. For example, if a collective bargaining agreement lists job duties, such a list may be taken into account in determining whether a given task is an essential function of the job. Again, however, the agreement would not be determinative on the issue.[7/]

[3/]29 U.S.C. § 102(b)(2).

[4/]29 U.S.C. § 102(b)(2).

[5/]Report of the Senate Committee on Labor and Human Resources, S.Rep.No. 101-116, 101st Cong. 1st Sess. at 32 (1989) (Senate Report).

[6/]Report of the House Committee on Education and Labor, H. Rep. No. 101-485, 101st Cong. 2d Sess. at 63 (1990) (House Report).

[7/]Id.

Based on this legislative history a CBA probably should not be the only factor which an employer raises as a defense to reasonable accommodation. In addition, school employers will need to balance the rights of qualified disabled employees with the statutory rights of non-disabled employees, e.g. employees who have been laid off or who have reemployment rights following extended industrial accident and/or illness leave.[8/] Until these issues are resolved by courts, school employers are well advised to negotiate with their employee associations to address issues which may arise when making accommodations for disabled employees such as conflicts related to transfer, promotion and seniority rules.

C. Avoiding Direct Bargaining Charges

The ADA requires the employer to engage in an interactive process with disabled employees to determine whether reasonable accommodation may be necessary to allow the disabled person to perform essential job functions. The fact that the ADA requires such individual discussions, does not eliminate the duty to negotiate with the union over the impact or effects on working conditions and also does not negate the possibility of a direct bargaining charge by the union. This type of charge arises when the employer negotiates directly with a represented employee with regard to terms and conditions of employment within the scope of representation.[9/]

[8/]See e.g., California Education Code, §§ 44956, 45192.

[9/]See e.g., California Government Code, § 3543.5.

Negotiating a reasonable accommodation provision with the union may avoid charges of direct bargaining or bypassing the exclusive representative. In addition, the school employers may be able to enlist the support of the union to educate non-disabled employees about the duty to reasonably accommodate. This may avoid challenges from non-disabled employees against a district's efforts to provide reasonable accommodation.

D. Summary

Successfully integrating the ADA with the legal duties associated with collective bargaining requires a working knowledge of the ADA and analysis of how the law will impact existing agreements, practices and the obligation to negotiate. District and union negotiators should become familiar with the ADA to insure that negotiations and ongoing contract administration further the statutory mandates of the ADA. By involving the Union in the process of insuring compliance, school employers may find that unions are able to assist in the process of educating disabled and non-disabled employees about reasonable accommodation and its impact on working conditions.

SAMPLE -- AMERICANS WITH DISABILITIES ACT (ADA) PROVISION

1. The _____ School District ("District") and the Association acknowledge that both parties have a legal obligation to consider reasonable accommodation for qualified disabled employees.

2. If the District determines that it must reasonably accommodate a disabled employee, that legal obligation shall supercede all sections of this agreement in conflict with the duty to reasonably accommodate.

3. The Association recognizes that the District has the legal obligation to meet individually with qualified disabled employees to discuss reasonable accommodation. If the District determines that implementation of the reasonable accommodation will conflict with the rights of other employees, the District will give the

Association written notice and an opportunity to meet with the District to discuss alternatives. The Association agrees to keep medical information related to the reason for the reasonable accommodation confidential, unless the affected employee signs a release.

4. Any reasonable accommodation provided under the ADA shall not establish a past practice, nor shall it be cited or used as evidence of a past practice in the grievance/arbitration procedure. Any action taken pursuant to this [Article/Section] shall not be subject to challenge through Article ____ (Grievance Procedure).

5. For the purposes of this [Article/Section] "employee" includes current unit members, employees from other bargaining units whose reasonable accommodation involves assignment to a position in this bargaining unit, and new employees whose employment in the bargaining unit will involve reasonable accommodation.

II. FAMILY AND MEDICAL CARE LEAVE

School employers need to implement a Family and Medical Leave Act ("FMLA") policy and may also need to negotiate FMLA provisions with represented employees. The following information is intended to alert districts to key aspects of the law[10/] and to provide a framework for district proposals and/or policies.

A. INTRODUCTION

Many states already have generous statutory leave provisions governing public school employees in addition to the provisions of CBA's. For example, California has sick leave[11/], extended sick leave[12/] and catastrophic leave.[13/] It is therefore conceivable that school districts will be able to coordinate FMLA

[10/]This information is based on the currently available federal and state regulations. The California Department of Fair Employment and Housing has proposed new regulations implementing the 1993 amendments to the California "FMLA".

[11/](California Education Code, § 44978.)

[12/](California Education Code, § 44977.)

[13/](California Education Code, § 44043.5.)

leave with existing statutory or contractual leave, rather than offering additional FMLA leave under federal and/or state law.

B. MAJOR PROVISIONS OF FMLA

1. COVERED EMPLOYEES INCLUDE:

a. Non-instructional (classified)[14/] employees who have worked in the district for 12 months and a minimum of 1250 hours. Nine, ten and eleven month employees who return each year, should be considered to have met the 12 month requirement so long as they meet the 1250 hours requirement.

b. Certificated employees who have worked for the district for a minimum of one school year. Part-time teachers would be subject to the 1250 hours requirement.

2. REASONS FOR LEAVE INCLUDE:

a. Birth, adoption, foster care of child (within one year of event).

b. Care of a family member with a serious health condition:

(i) Family member includes spouse (husband or wife), parent, son or daughter;

(ii) "Serious Health Condition" is defined as any illness, injury, impairment or physical or mental condition that requires either (a) inpatient care in a hospital, hospice, or residential care facility, or (b) continuing treatment by or under the supervision of a health care provider.

c. Employee's own serious health condition.

[14/]California law defines all non-instructional staff as "classified". (California Education Code, § 45103.)

3. AMOUNT OF LEAVE:

a. Twelve weeks per year during any 12-month period which may be based on:

(i) The calendar year;

(ii) Any fixed 12-month period such as anniversary date or fiscal year;

(iii) 12-month period measured forward from the date the employee's first family care leave begins; or

(iv) A rolling 12-month period measured backward from the date an employee uses family care leave.

4. HOW MAY LEAVE BE TAKEN:

Employees may take leave:

a. In full weeks or days;

b. Intermittent leave in separate blocks of time taken due to a single illness or injury i.e. for chemotherapy, radiation, kidney dialysis or other treatments of a similar nature;[15/]

c. On a reduced leave schedule by reducing the number of hours per day or days per week worked. An employee who requests leave on an intermittent or a reduced leave schedule may be required to transfer temporarily to a position that better accommodates recurring periods of absence than the employee's regular position.

5. BENEFITS DURING LEAVE:

a. Employees receive health and welfare benefits at the same level received prior to the family care leave.

[15/]The federal regulations also recognize that intermittent leave may be used for ongoing pregnancy, severe morning sickness, prenatal care, childbirth and recovery from childbirth. (29 C.F.R., § 825.113.)

b. Cost of health care premiums may be recovered if the employee fails to return to work, unless the reason for failure to return is beyond the employee's control.

6. EXHAUSTION OF OTHER FORMS OF LEAVE:

a. Employers may require and employees may request:

(i) Exhaustion of vacation, compensatory and other accrued leave, other than sick leave for all types of FMLA leave.

(ii) Exhaustion of all forms of sick leave for the employee's own serious health condition.

b. The parties may mutually agree to:

(i) Exhaustion of sick leave for the birth, adoption, or foster care of a child or serious health condition of a child, parent or spouse.

7. RIGHT TO RETURN TO EQUIVALENT POSITION:

a. The employee has the right to return to an equivalent position with equivalent pay and benefits.[16/]

b. "Key" employees (employees among highest paid 10% of all employees) may be denied return to work if the district is able to show "substantial and grievous economic injury" will result.

8. NOTICE OF FAMILY CARE LEAVE FROM EMPLOYEE:

a. Employers may require:

(i) Thirty (30) days notice for foreseeable leave.

(ii) Notice as soon as practicable for unforeseeable leave.

[16/]California law currently refers return to the "same or a comparable position." Proposed amendments to the existing regulations would conform California law to the federal language of "equivalent position."

b. The employer may refuse leave for failure to provide notice if:

(i) The employee had no reasonable excuse for failure to give notice;

(ii) The employee actually knew of the notice requirements; and

(iii) The need for leave was clearly foreseeable.

9. MEDICAL CERTIFICATION OF SERIOUS HEALTH CONDITION:

Employers may require:

a. Medical certification of serious health condition of a child, spouse or parent and statement that the serious health condition requires the participation of a family member.

b. Medical certification of an employee's own serious health condition and that he/she is unable to perform the function of his/her position.

If doubt exists about medical certification for the employee's own serious health condition, the district may seek a second opinion from a physician of its choice at district expense. If the parties still disagree, the parties may mutually select a third physician at district expense, whose decision is binding.

10. LIMITATIONS ON SPOUSES:

Employers may:

Limit spouses to one 12 week leave period for birth, adoption or foster care leave. However, this does not limit the right to family care leave for other reasons.

11. PREGNANCY DISABILITY LEAVE:

a. Federal law: Leave associated with pregnancy disability is considered leave for the employee's own serious health condition.

b. California law: Employee is permitted to take up to four months of pregnancy disability leave in addition to 12 weeks of family and medical care leave.

12. FITNESS FOR DUTY CERTIFICATIONS:

Employers may require fitness for return to duty certification following leave for the employee's own serious health condition.[17/]

III. NEGOTIATING FAMILY CARE LEAVE

Issues to anticipate in negotiations include coordination of FMLA leave with existing leave provisions in CBA's, creating notice and certification requirements, and responding to requests to extend the benefits afforded under state or federal law.

The simplest approach to negotiating FMLA leave is to indicate in the agreement that the employer will follow applicable law. (See Sample 2.) However, this type of provision does not necessarily address the issue of coordination. For example, a CBA may provide an unpaid childrearing/maternity leave. If such leave is not expressly coordinated with FMLA leave, this could result in an employee requesting FMLA leave (with benefits) and then requesting a contractual leave. Under California law, this could entitle the employee to up to four

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[17/]Employers must be conscious of the interplay with the Americans with Disabilities Act in this area. In other words, reasonable accommodation may have to be considered when a disabled employee is returning to work.

months of leave for pregnancy disability, 12 weeks of FMLA leave and then a contractual period of childrearing leave. This is probably more leave than most school employer would have contemplated.

Additionally, unions may seek "expanded" coverage in negotiations, such as allowing employees to care for seriously ill in-laws or unmarried partners or allowing employees to use accrued sick leave for purposes other than the employee's own illness. An issue which may also arise is whether the district may inquire about use of vacation to insure that FMLA leave is being exhausted, as opposed to it being tacked on to vacation used for an FMLA purpose.

Negotiating FMLA provisions which negatively impact district operations may prevent claims to lengthy leaves and should assist the district to establish uniform procedures for administering FMLA leaves of absence. Consistency in the implementation of FMLA policies will also protect the district from unwarranted claims of discrimination or violation of federal and state law.

SAMPLE 1 -- FAMILY CARE LEAVE

1. Unit members who have served more than 12 months with the District, and who have at least 1250 hours of service with the District during the previous 12 month period, may take up to a total of 12 workweeks of leave in any 12 month period for family care leave as defined in Government Code section 12945.2. Pursuant to Government Code section 12945.2, subdivision (e), unit members shall utilize and substitute any accrued time off (paid or unpaid), including accrued sick leave, during the period of family care leave granted under this section.

2. Unit members must request the leave at least thirty (30) days before the proposed commencement of the leave, except in cases when the reason for the leave is unforeseeable. In the latter case, unit members must give notice as soon as practicable, ordinarily within one or two working days of when the unit member learns of the need for the leave.

3. The unit member on family care leave should notify the District at least two (2) weeks before the estimated return date to confirm that he/she will return on such date. Where no return date has been estimated, the unit member will notify the District of the intended return date at least two (2) weeks prior to return.

4. Certification of Need For Leave:

a. In all cases involving the need for leave due to a serious health condition, unit members must provide certification from a health care provider regarding 1) the date on which the serious health condition commenced, 2) the probable duration of the condition, and 3) an estimate of the amount of time the unit member will require to care for the child, parent or spouse. This statement shall also include a statement from the health care provider that the unit member's participation to provide care is warranted during the period of treatment of the seriously ill member of the immediate family, as defined in section ____.

b. In addition to the information described in section 4 (a)(1-3) above, certifications accompanying requests for leave due to the employee's own serious health condition shall include a statement from the health care provider that, due to the serious health condition, the employee is unable to perform the function of his/her position.

5. Family care leave shall not be used to extend the time established under section 6 of this agreement for a childrearing leave.

6. Time spent on family care leave of absence under this section shall be counted as service time in the District for the purpose of constituting "service credit" as provided in Appendix ___ of this Agreement.

SAMPLE 2

The District will comply with state and federal laws and regulations regarding family and medical care leaves. Family and medical care leave shall be coordinated with other leaves available under this Agreement as permitted by law.